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IN THE SUPREME COURT OF MISSISSIPPI

Docket No. 33914

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,

Plaintiff-Appellant,

vs.

THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS,

Defendant-Appellee.

BASIS UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION.

(a) It is provided by Section 237, Judicial Code, as amended (28 U. S. C., Sec. 344(a)):

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

(b) The Mississippi Levee District was created by Chapter 1, Laws of 1865, under the name "The Board of Levee Commissioners for the counties of Bolivar, Washington, and Issaquena" which statute was amended by Chapter 45, Laws of 1877, so as to designate the district as "The Mississippi Levee District" and changing the name of its board of commissioners to "The Board of Mississippi Levee Commissioners".

Section 7 of Chapter 154, Laws of Mississippi 1932, is as follows:

> "The board of Mississippi Levee Commissioners is hereby authorized and empowered to levy and assess the following taxes upon the persons, property and privileges within the Mississippi Levee District, to-wit:
>
> (a) Acreage Tax—A uniform tax not exceeding 5¢ per acre on each and every acre of land included in the Mississippi Levee District, and each and every lot or parcel of land of less than one acre within said district. Whenever a reduction is made by the Board of Mississippi Levee Commissioners in their other taxes said Board shall make a proportionate reduction in the acreage tax levied and assessed by the provisions of this Act upon lands.
>
> (b) Ad Valorem Tax—A uniform ad valorem tax not exceeding 10 mills on the assessed value of all property of every kind, except such as is exempt from taxation under the general laws of the State of Mississippi, lying and situated within the Mississippi Levee District as the same shall appear upon the assessment rolls of the counties included wholly or in part within said district, and as the same shall appear upon the assessment rolls made and certified by the Mississippi State Tax Commission or its successor assessing property tangible or intangible within said district, and said tax shall be collected annually.
>
> (c) Cotton Tax—A uniform tax not exceeding ⅕ of 1¢ per pound on all lint cotton annually grown and

ginned in said district and not exceeding 1/15 of 1¢ per pound upon each and every pound of cotton in the seed grown in said district but not ginned therein.

(d) Privilege Tax—A tax upon all privileges exercised or which may hereafter be exercised within the limits of said Levee District, and to amend, repeal or change the same, but the said privilege taxes shall in no case exceed the taxes levied by the State on the same privileges. Said Board, to make the levy of the privilege taxes above provided for, shall enter an order upon its minutes enumerating and designating the privileges taxed and the amount or rate of taxation levied thereon, a certified copy of which order shall be transmitted to each tax collector within the limits of said levee district by the Secretary of said Board; but this Act shall not effect the collection of any taxes heretofore levied and collectible, and no action of said Board shall be held to relieve any person from the payment of any taxes collectible under existing laws."

Section 8 of said Chapter 154, Laws of 1932, is as follows:

"The said Levee Board shall annually at its July meeting, or any regular, adjourned, special or called meeting thereafter, enter an order upon its minutes levying the taxes authorized in the foregoing Section, or such thereof as in the discretion of the Board is necessary and proper, at such rates as shall be determined by said Board, and the said Board may reduce the rate of taxation in any one or more of said classes provided acreage tax shall not be reduced below 2¢ per acre unless said acreage tax shall be abolished entirely, and the said Levee Board may abolish and re-establish as it sees fit any one or more of said classes of taxation provided, however, that said Board shall provide sufficient revenue with which to pay the interest and principal of all outstanding bonds and other fiscal obligations of the said Board, and if necessary may be required to do so by mandamus."

Section 10 of said Chapter 154, Laws of 1932, is as follows:

> "The property of the railroads and other public utilities and the privileges exercised by them within the Mississippi Levee District shall be taxable under the foregoing powers granted the Board in the same manner and to the same extent as the property and privileges of other persons and corporations within said district, but this shall not be construed to require all classes of privileges to be taxed at the same time nor at the same proportion."

Acting by virtue of authority conferred upon them by said three sections of Chapter 154, Laws of Mississippi, 1932, the defendant Board of Mississippi Levee Commissioners at a regular meeting of the Board on July 11, 1938, entered three certain orders upon its minutes levying the taxes for the current fiscal year, the first of said orders imposing and levying the following taxes upon all of the property within the Mississippi Levee District, as follows, to-wit:

> (a) A uniform tax of 2¢ per acre on each and every acre of land included in the Mississippi Levee District and not in an incorporated city, town or village, and a tax of 2¢ on each and every lot of less than one acre in every city, town or village in said district, and
>
> (b) a uniform ad valorem tax of 3 mills on the assessed valuation of all property, real and personal, lying and being in the Mississippi Levee District as the same shall appear upon the assessment roll of the counties therein, respectively.

The second order levied and imposed an annual privilege tax upon each person engaged in the business of operating a railroad in the Mississippi Levee District on the following classified basis:

On each railroad of the 1st class—per mile	$90.00
On each railroad of the 2nd class—per mile	$80.00
On each railroad of the 3rd class—per mile	$70.00
On each railroad of the 4th class—per mile	$60.00
On each railroad of the 5th class—per mile	$50.00
On each railroad of the 6th class—per mile	$40.00
On each railroad of the 7th class—per mile	$30.00
On each railroad of the 8th class—per mile	$20.00
On each railroad of the 9th class—per mile	$10.00
On each railroad of the 10th class—per mile	$5.00

It was ordered that the above taxes on Railroad Companies should be for each mile operated in said Levee District, and that such taxes should be paid on each railroad according to the classification into ten classes numbered consecutively from one to ten of railroad and branches thereof made by the State Tax Commission.

The order levying said railroad privilege tax provides that it shall be the duty of the Secretary of the Levee District to send notices to each person engaged in the business of operating a railroad in said Levee District and the said tax is required to be paid to the Treasurer of the District on the first day of December, 1938 "and on the first day of December in each year thereafter." Accordingly and in pursuance of the said order, the railroad company received from the Secretary of the Board a certified copy of said order with a demand for the payment of the tax.

The third order of said Board declared that the cotton tax should be abolished. All of said orders are still in full force and effect and have not been altered. No other orders levying taxes for the fiscal year 1938 have been passed by the defendant board.

In this proceeding the plaintiff, the Yazoo & Mississippi Valley Railroad Company, has drawn in question the validity of the so-called privilege tax imposed and levied on the plaintiff, the Yazoo and Mississippi Valley Railroad Company, under and by virtue of the authority of said sections

7, 8 and 10 of Chapter 154, Laws of Mississippi, 1932, and the Supreme Court of Mississippi, in a decision concurred in by three of the six justices of the Supreme Court, and, notwithstanding the dissent of the other three justices of said court, affirmed the judgment of the Circuit Court of Washington County, Miss., dismissing the declaration filed by the plaintiff and refusing to order a refund of the privilege taxes paid by the plaintiff to the defendant under protest for the privilege of operating its railroad in the Mississippi Levee District, and the said judgment of the Supreme Court affirmed the validity of the tax imposed under and by virtue of the authority of said sections 7, 8 and 10 of Chapter 154, Laws of Mississippi, 1932, notwithstanding the contention of the plaintiff that the said tax was violative of the equal protection and due process clauses of the 14th Amendment to the Federal Constitution and imposed a burden on interstate commerce in violation of the commerce clause of the Federal Constitution.

(c) The said final judgment of the Supreme Court of Mississippi affirming the dismissal of plaintiff's declaration was entered on May 6, 1940, and the petition for appeal was presented in the Supreme Court of Mississippi on the 20th day of May, 1940.

Nature of the Case.

The action was brought by the Yazoo & Mississippi Valley Railroad Company in the Circuit Court of Washington County, Mississippi, against the Board of Mississippi Levee Commissioners to recover the amount of the so-called privilege taxes previously paid by the plaintiff to the said defendant under protest. The amount of said taxes which were demanded by the defendant and which were so paid by the plaintiff was $10,673.00. The case was tried on a

stipulation of facts, which was in words and figures substantially as follows:

"The defendant, the Board of Mississippi Levee Commissioners, hereinafter called for convenience 'The Board', is a corporation created under the laws of the State of Mississippi by act of legislature approved November 27, 1865, with the right to sue and be sued, and the original name of said corporation was changed to the present name by act of the legislature approved January 27, 1877. The domicile and principal office of said Board of Mississippi Levee Commissioners is in the City of Greenville, Washington County, Mississippi.

"The said Board was created for the sole purpose of constructing, repairing and maintaining levees along the Mississippi River in order to protect the territory designated as the Mississippi Levee District from the flood waters of the Mississippi River. The said Mississippi Levee District is a local improvement district, consisting of Counties of Washington, Bolivar and Sharkey, and portions of Issaquena, Warren and Humphreys, approximately 110 miles long and 25 miles wide, and containing approximately 1,481,412 acres of land.

"Chapter 154 of the Acts of the Legislature of Mississippi of 1932, approved April 6, 1932, provides a system for raising revenues in the Mississippi Levee District by means of (a) an acreage tax, (b) an advalorem tax, (c) a cotton tax, and (d) a privilege tax and provides that said Levee Board shall annually, at its July meeting, or any regular, adjourned, special, or called meeting thereafter, enter an order upon its minutes, levying the taxes authorized in the foregoing section, or such thereof as in the discretion of the Board is necessary and proper at such rates as shall be determined by said Board.

"At a regular meeting of the Board on July 11, 1938, the Defendant Board entered certain orders upon its minutes levying the taxes for the current fiscal year, acting, or purporting to act, under the authority of said Chapter 154, and thereby adopted the following taxes, to-wit:

(a) A uniform tax of 2¢ per acre on each and every acre of land included in the Mississippi Levee District and not

in an incorporated city, town or village, and a tax of 2¢ on each and every lot of less than one acre in every city, town or village in said district, and

(b) a uniform advalorem tax of 3 mills on the assessed valuation of all property, real and personal, lying and being in the Mississippi Levee District as the same shall appear upon the assessment roll of the counties therein, respectively, and

(c) an annual privilege tax upon each person engaged in the business of operating a railroad in the Mississippi Levee District on the following classified basis:

On each railroad of the 1st class—per mile	$90.00
On each railroad of the 2nd class—per mile	$80.00
On each railroad of the 3rd class—per mile	$70.00
On each railroad of the 4th class—per mile	$60.00
On each railroad of the 5th class—per mile	$50.00
On each railroad of the 6th class—per mile	$40.00
On each railroad of the 7th class—per mile	$30.00
On each railroad of the 8th class—per mile	$20.00
On each railroad of the 9th class—per mile	$10.00
On each railroad of the 10th class—per mile	$5.00

It was ordered that the above taxes on Railroad Companies should be for each mile operated in said Levee District and that such taxes should be paid on each railroad according to the classification into ten classes numbered consecutively from one to ten of railroad and branches thereof made by the State Tax Commission.

The order levying said railroad privilege tax provides that it shall be the duty of the Secretary of the Levee District to send notices to each person engaged in the business of operating a railroad in said Levee District and the said tax is required to be paid to the Treasurer of the District on the first day of December, 1938 "and on the first day of December in each year thereafter." Accordingly and in pursuance of the said order, the railroad company received from the Secretary of the Board a certified copy of said order with a demand for the payment of the tax.

By resolution of The Board, it was thereupon determined that the cotton tax should be abolished.

All of the said orders are still in full force and effect and have not been altered. No other orders of the Board levying taxes for the fiscal year 1938 have been passed by the Defendant Board. Under and by virtue of said order fixing advalorem taxes and acreage taxes the Plaintiff was required to pay, and did pay to the Tax Collectors of the several counties in the Mississippi Levee District, for the benefit of the Board, taxes on the assessed value of all plaintiff's property within the Mississippi Levee District as the same appear upon the assessment rolls of said counties, at the rate of 3 mills, the same as was paid by all other property owners in said district. Plaintiff was also required to pay at the same time an acreage tax of 2¢ per acre on each and every acre of land outside of incorporated cities, towns and villages, owned by plaintiff on exactly the same basis as all other owners of lands and lots in the Mississippi Levee District. The amount of advalorem and acreage taxes for 1938 paid by plaintiff was $9,633.87.

In addition to the payment of advalorem and acreage taxes, plaintiff was required under said order of the Board to pay a privilege tax "on or before December 1, 1938, and on the first day of December in each year hereafter," and the tax which was demanded on December 1, 1938, amounted to $10,673. There are no railroads in the Mississippi Levee District other than the plaintiff's and the Columbus and Greenville Railroad which latter railroad, under the terms of said order, was required to pay a railroad privilege tax of approximately $500.

No other privilege taxes were imposed at the July meeting. However, an order was passed at the July, 1932, meeting, immediately after the passage of Chapter 154, Laws of 1932, levying a privilege tax on public utilities other than railroads, at the rate of 50 per cent of the state rate. The other public utilities have been paying this tax annually on the basis of this original order, notwithstanding the fact that said Chapter 154 requires that the taxes for the Levee District be levied annually.

Assuming that the standing order of 1932 imposes valid taxes on the public utilities, the resulting situation is that privilege taxes are now being imposed only on the two railroads, the Yazoo & Mississippi Valley Railroad Company

and the Columbus & Greenville Railway Company and on seven public utilities. The names and amounts paid for the fiscal year ending June 30, 1938, are as follows:

The Yazoo & Mississippi Valley Railroad Company	$10,673.00
Columbus & Greenville Railway Company	552.30
Southern Bell Telephone & Telegraph Company	1,410.45
Mississippi Power & Light Company	1,421.78
Railway Express Company	523.36
The Pullman Company	259.00
Southeastern Express Company	36.82
Western Union Telegraph Company	37.07
Postal Telegraph & Cable Company	480.52
	$15,394.30

No other privilege taxes are, or ever have been, imposed by the Board. The amounts above stated are substantially equal to, and fairly representative of, the amounts of privilege taxes levied by the Board against, and paid by, the said railroads and public utilities, for each of the years since the enactment of Chapter 154 in 1932 and including the fiscal year ending June 30, 1939, except that for the year 1937 the plaintiff paid for privilege taxes the sum of $7,608.

Since the enactment of Chapter 154 in 1932 the acreage tax has remained at 2¢ per acre, the advalorem tax has remained at 3 mills and the cotton tax has been at the rate of ⅕¢ per pound, except for the years 1936 and 1937 in which years the cotton tax was at the rate of 1/10¢ per pound, a reduction of 50 per cent, and in 1938 the cotton tax was abolished entirely.

The railroad mileage tax has been fixed each year at 100 per cent of the maximum state rate, but for the year 1937 the Board failed to readjust its rates in accordance with a change of the law and accepted payment by the plaintiff railroad company under the old standing order which produced a tax of $7,608, instead of the amended maximum state's rates which would have produced a tax of approximately $10,673.

The privilege tax on public utilities has remained throughout at 50 per cent of the state rates.

The amount of revenue raised by the various classes of taxes imposed by the Board during these years is as follows:

REVENUES OF MISSISSIPPI LEVEE DISTRICT.

Year.	Advalorem and acreage combined.	Cotton.	Public utilities privilege.	Railroad mileage.	Total revenues.
1933	$136,482	$232,406	$4,329	$11,201	$384,507
1934	155,524	211,542	4,407	11,211	382,725
1935	185,899	190,456	4,245	11,561	393,227
1936	189,801	216,359	4,272	11,561	426,437
1937	210,541	172,855	4,238	7,976	396,674
1938	187,900	213,303	4,205	11,225	418,411
	$1,066,147	$1,237,008	$25,696	$64,735	$2,401,981

During these same years the taxes imposed on, and paid by, the Yazoo & Mississippi Valley Railroad Company are, as follows:

Y. & M. V. TAXES IN MISSISSIPPI LEVEE DISTRICT.

Year.	Advalorem and acreage combined.	Mileage.	Total advalorem, acreage and mileage.
1933	$12,421	$10,833	$23,254
1934	10,293	10,843	21,136
1935	10,283	11,193	21,476
1936	10,265	11,193	21,458
1937	10,038	7,608	17,646
1938	10,017	10,673	20,690
	$63,317	$62,343	$125,660

The amount of advalorem and acreage taxes paid by plaintiff during each of the years 1933 to 1938, both inclusive, was approximately 5.9 per cent of the total revenue raised by advalorem and acreage taxes for the Mississippi Levee District; and the total amount of taxes paid by plaintiff including the mileage taxes during these same years was approximately 5.2 per cent of the total amount of revenue raised by the Mississippi Levee District through taxes of all kinds.

The effect of abolishing the cotton tax for the fiscal year ending June 30, 1939, and leaving the rates of taxation for the acreage tax, the advalorem tax, and the public utility

and railroad mileage tax the same as for the previous year is that approximately the following amounts were expected to be raised by taxation for the Mississippi Levee District, based on the experience of the preceding six years:

Advalorem and acreage taxes	$188,000.00
Public Utilities privilege tax	4,205.00
Railroad Mileage tax	11,225.00
Total estimated revenues	$203,430.00

The amount of the plaintiff's advalorem and acreage taxes imposed by the Board for the fiscal year 1938 are at the same rate as those imposed on all other taxpayers in the District and the amount is approximately $9,633.

The advalorem and acreage tax paid by plaintiff, $9,633, plus the mileage privilege tax paid by plaintiff, $10,673, make a total of $20,306 required of plaintiff for the year 1938, which is 10 per cent of the total revenues of the Levee District for 1938.

The term "fiscal year 1938" means the year beginning July 1, 1938, and ending June 30, 1939.

The Mississippi Levee District is approximately 110 miles long with an average width of about 25 miles and said district contains 1,481,412 acres of land within the protection of the levees. The complainant company owns 4,223 acres of land within said Levee District, all of which was used during the year 1938 for its right-of-way, station grounds, and other railroad purposes. The Columbus & Greenville Railway Company owned during the year 1938 approximately 250 acres of land in said district, all of which was used as part of said railroad. There are only two railroads in said Levee District and have been only two railroads in said district for the last forty years. The railroad which is now known as The Yazoo & Mississippi Valley Railroad was built in or about the year 1886, and the railroad which is now known as the Columbus & Greenville Railway was built in or about the year 1888. The railroad now known as the Yazoo & Mississippi Valley Railroad Company and the Columbus & Greenville Railway Company have formerly been known by various other names, but said

changes in name are disregarded as immaterial for the purposes of this statement.

During the year 1938, the plaintiff company had in the Mississippi Levee District a total of 310.40 miles of track, of which 117.15 miles were main or trunk line tracks, and 193.25 miles were branch or feeder line tracks. During said year the Columbus & Greenville Railway Company had in said district 18.41 miles of main line track with no branches. Both of said railroads are engaged in interstate commerce, which constitutes the large majority of their business, and the property of said railroad companies within the Mississippi Levee District was throughout the year 1938 used mainly in interstate commerce, but was at the same time used partially for intrastate commerce.

The value of all plaintiff's property in the Mississippi Levee District as assessed by the State Tax Commission for the year 1938 was $3,211,000. The assessed value of all property in the Mississippi Levee District for the same year was $68,180,000. Substantially the sole source of revenue of the Board is taxation of the classes hereinabove mentioned. The Board has outstanding bonds aggregating $2,100,000. The principal source of income produced within the Mississippi Levee District is cotton. The cotton produced in the Mississippi Levee District is generally the better quality and brings a substantially higher price than the average of other cotton. Under the laws of Mississippi, cotton is not assessed for taxation on the assessment rolls of the counties and the cotton produced in the Mississippi Levee District is not taxed for any purpose, except the cotton tax imposed by the Board for levee purposes prior to the year 1938. The remainder of the portion of the State of Mississippi subject to overflow by the flood waters of the Mississippi River, not included in the Mississippi Levee District, is embraced within a levee district known as the Yazoo-Mississippi Delta Levee District, which was created in 1884. The Yazoo-Mississippi Delta Levee District throughout its entire history, including the year 1938, has raised its revenue by a combination of three taxes, to-wit: a general advalorem tax on all property within said Levee District, including railroad property, a privilege tax on sub-

stantially all occupations and privileges which are taxed by the State of Mississippi and an acreage tax of 2¢ per acre and 2¢ per lot on all land in the district."

A "statute of any state", decision concerning the constitutionality of which may be reviewed on appeal, is not limited to enactments of the State legislature, but includes every act, legislative in character, to which the State gives the force of law, such as a municipal ordinance fixing rates, orders of State commissions and other agencies exercising delegated legislative authority.

King Mfg. Co. v. *City Council of Augusta* (1928), 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801;

Live Oak Water Users' Assn. v. *Railroad Commission of State of California* (1926), 269 U. S. 354, 46 S. Ct. 149, 70 L. Ed. 305;

Hamilton v. *Regents of University of California* (1934), 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343;

Lake Erie & Western R. R. Co. v. *State Public Commission, ex Rel., Cameron*, 249 U. S. 422-4;

Sultan Ry. Co. v. *Dept. of Labor*, 277 U. S. 135.

Federal Question Raised.

The Federal question was raised in the plaintiff's original declaration in the following language:

"Plaintiff enjoys no benefits from the operations of the Mississippi Levee District other than those enjoyed generally by all property owners and businesses in the District proportionately to the value of their property or to the extent of their business. The said mileage tax is discriminatory and imposes a grossly unequal burden on the plaintiff as compared with other taxpayers and property owners in the Mississippi Levee District. It is a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and if enforced, would result in the taking of plaintiff's property without

due process of law in violation of the Due Process Clause of the Fourteenth Amendment; and the said so-called privilege tax, if enforced, would be a direct burden on interstate commerce in violation of the right to regulate commerce between the states which is reserved to the Congress of the United States by the Federal Constitution.

"Upon receipt of demand for said privilege tax, Plaintiff protested to the said Board that the said tax was discriminatory and unconstitutional, and wrote to each member of the Board and the Attorney thereof urging them to rescind said order of July 11, 1938, levying the privilege tax on railroads. Nevertheless, the Board failed and refused to rescind said order but continued to demand said tax. Thereupon, plaintiff, being in doubt as to its remedies in the State Court, filed suit in a Federal Court to enjoin the collection of said tax, but the Defendant Board appeared, in response to said suit in Federal Court, and filed a motion to dismiss the bill of complaint on the ground that plaintiff had adequate remedies at law in the courts of the State of Mississippi. Thereupon, it was stipulated and agreed that plaintiff should pay the said privilege tax amounting to $10,673.00 under protest to the Board, and that plaintiff might bring suit for its recovery, and, if said tax should be held unconstitutional or for any reason not legally due, the Board would refund said payment. Thereupon, in accordance with the terms of said stipulation, plaintiff paid said amount to the Board under protest. Said suit in Federal Court has been dismissed."

Plaintiff's contentions with reference to said Federal questions were denied by the Supreme Court of Mississippi by its judgment of dismissal and specifically in the opinion of said court, where it said:

"The district, as the statutes and Constitution disclose, was not created simply for the purpose of increasing the utility of the land therein for agricultural purposes, but, in addition thereto, for the purpose of protecting the lives, homes, property and business enterprises of the inhabitants of the district from destruction by the flood waters of the Mississippi River. Its revenue, as appears from the his-

tory thereof hereinbefore set forth, has never been derived from an assessment of property according to benefits derived by it from the construction and maintenance of the levees, but from taxation of the character that the state employs for raising its revenue, and under Sections 236 and 237 of the State's Constitution, the legislature is not required, if indeed it has the power, to restrict the district to raising its revenue from an assessment of benefits. Smith *v.* Willis, 78 Miss. 243, 28 So. 878. Consequently, the cases cited in the brief of counsel for the appellant dealing with inequalities and differences in method of assessing benefits to property from a local improvement, e.g., KCS Railroad Co. *v.* Road Imp. District, 256 U. S. 658, 65 L. Ed. 1151, are of little value here."

On the contrary, the three dissenting justices expressed the following opinion:

"The levee district is fundamentally a special improvement district—not a governmental agency."

Next, the prevailing opinion quoted plaintiff's contention that the tax in question "is an exaction of a fixed amount per mile of railroad without relation to the granting of any privilege and is arbitrary and unreasonable and therefore unconstitutional and void".

The prevailing opinion stated that "the state may select the occupations and professions to be taxed, the only requirements in this connection being (1) that all of the same class be taxed alike, and (2) that the tax imposed be not so unnecessarily high as to deprive the persons taxed of the right to engage in a lawful occupation or business, and that the grading of the tax according to railroad mileage is unobjectionable. The prevailing opinion further held that placing this privilege tax on railroads alone was not an unreasonable classification and that the railroad company has no just cause of complaint because of the fact that it is called on to pay an ad valorem and an acreage tax on

its land in common with other land owners and, in addition thereto, a tax on the privilege of operating its railroad.

The opinion of the three dissenting justices, on the other hand, held that the "tax laid against the railroad company is unreasonably discriminatory and therefore falls within the condemnation of the equal protection clause of the Federal Constitution", and further "the tax against the railroad company is also an arbitrary abuse of power and falls within the condemnation of the due process clause of the Federal Constitution".

Plaintiff's contentions with reference to the burden on interstate commerce were ignored in the opinion of the Supreme Court of Mississippi but were necessarily denied in the judgment of affirmance dismissing the complaint.

A true copy of the prevailing opinion and the dissenting opinion is hereto attached as Exhibit A.

Respectfully submitted,

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EXHIBIT "A".

IN THE SUPREME COURT OF MISSISSIPPI.

No. 33,914.

IN BANC

Y. & M. V. RAILROAD COMPANY

vs.

THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS.

SMITH, *C. J.:*

This is an action by the appellant to recover from the appellee taxes paid by it to the appellee under protest. A jury was waived and the case was tried by the judge, who, after hearing the evidence, rendered a judgment denying appellant a recovery. The case made by the record is as follows: The counties and parts of counties in this state lying in the Mississippi River Valley, the lands of which would be subject to innundation from overflow waters of the river, are divided into two districts created for the purpose of constructing, repairing, and maintaining levees along the Mississippi River to protect the land within the districts from the river's flood waters. The Mississippi Levee District was created by Chapter 1, Laws of 1865, under the name of "The Board of Levee Commissioners for the Counties of Bolivar, Washington, and Issaquena" which statute was amended by Chapter 45, Laws of 1877, so as to designate the district as "The Mississippi Levee District" and changing the name of its board of commissioners to "The Board of Mississippi Levee Commissioners". The 1865 statute imposed a tax of ten cents an acre per annum upon all land within the district and a one cent per pound, per annum tax on cotton grown in the district. These two taxes, with variations in the rate thereof, were continued up to the fiscal year 1938, when the cotton tax was discontinued. By Chapter 7, Laws of 1886, an additional tax for the support of the district was imposed on

all railroads within the district varying according to the type of the road from $100.00 to $60.00 per annum per mile of the railroad.

By Article 11 of the State's Constitution adopted in 1890, maintenance of a levee system in the State was made mandatory. The creation by the legislature theretofore of the two Mississippi Levee Districts was approved, and the legislature being given power to change their boundaries by law. The article deals extensively with the powers of the two boards of levee commissioners. Section 236 thereof approves the taxes then in force for the support of the districts and makes it mandatory on the legislature to impose an acreage tax on land in the district and authorizes it to provide for the discontinuance of the tax on cotton. Section 237 grants the legislature "full power to provide such system of taxation for said levee districts as it shall, from time to time, deem wise and proper." By Chapter 63, Laws of 1892, and various statutes thereafter, the foregoing taxes were continued. Chapter 125, Laws of 1908, amended Chapter 7, Laws of 1886, so as to impose an annual tax on railroads varying from $200.00 to $50.00 per mile according to the type of the road. Chapter 282, Laws of 1914, changed the rate of this tax to $350.00 per annum decreasing to $87.50 per annum on each mile of a railroad according to its type. That Chapter was amended by Chapter 259, Laws of 1926, so as to provide that a railroad company owning not more than 25 miles of railroad should pay a tax only of $50.00 per annum. By Chapter 154, Laws of 1932, the laws governing the Mississippi Levee District were revised. Section 7 thereof authorized the levee commissioner "to levy and assess the following taxes upon the persons, property and privileges within the Mississippi Levee District, to-wit: "(a) An acreage tax not to exceed 5¢ per acre; (b) an ad valorem tax of not exceeding ten mills on the assessed value of all property in the district not exempt from taxation under the general laws of the state; (c) a tax on cotton grown in the district not to exceed one-fifth of one cent per pound thereof; and (d) a tax on all privileges exercised within the district. Section 8 thereof requires the taxes to be levied annually at the June meeting of the Board of

Levee Commissioners or any meeting thereafter and authorizes the board "to abolish and re-establish as it sees fit any one or more of said classes of taxation provided" sufficient revenue is raised to pay the bonds and other outstanding obligations of the district.

For the fiscal years of 1932 to 1938, inclusive, the board levied each of the foregoing taxes, the privilege tax being only on public utilities; on railroads being the same as that levied by the state by Section 176, Chapter 20, Laws of 1935, upon each railroad of the first class, $90.00 per mile; of the second class, $80.00 per mile; of the third class, $70.00 per mile and so on to the 10th class, $5.00 per mile. The classification of the railroads is made under Section 181, Chapter 20, Laws of 1935 by the Tax Commissioner. Taxes imposed on other public utilities were one-half of that imposed on them by Chapter 20, Laws of 1935. The class of railroads to which the appellant belonged does not appear. There are only two railroads in the district, the appellant, and the Columbus & Greenville which has only a small amount of mileage in the district. The appellant has 117.15 miles of main line and 193.25 miles of branch or feeder lines. In 1938, the board abolished the tax on cotton grown in the district. The aggregate amount of taxes collected in the district for the year preceding the abolition of the cotton tax was $418,411.00. Based on previous experience, the total revenues for 1939 without the cotton tax will be $203,-430.00. In December, 1938, the appellant paid its acreage and ad valorem taxes amounting to $9,633.87, and paid also, under protest, its privilege tax amounting to $10,673.00, the latter being the tax it here seeks to recover. The privilege tax paid by the Columbus & Greenville Railroad Company was $552.30, that by the other utilities being Express Co., $36.82; Pullman Co., $259.00; Southern Bell Telephone & Telegraph Co., $1,410.45; Railway Express Co., $523.36; Western Union, $37.07; Postal Telegraph, $480.52; Miss. Power & Light Co., $1,421.78.

The brief of counsel for the appellant rests its right to a reversal of the judgment of the court below on three propositions which will be hereinafter separately set forth and considered, this opinion being limited thereto.

1. The appellant's first proposition is that "taxes levied by the Mississippi Levee District come under the class known as local improvement taxes". This is true, but the taxing power of the district does not, since the adoption of the Constitution of 1890, depend on a grant thereof by the legislature under its general legislative power. Under Section 227 et seq. of the Constitution, this levee district is in the same situation as if it had been originally created by the Constitution and its taxing power is that conferred by Section 236 of the Constitution and by the Legislature under Section 237 thereof. The district, as the statutes and Constitution disclose, was not created simply for the purpose of increasing the utility of the land therein for agricultural purposes, but, in addition thereto, for the purpose of protecting the lives, homes, property, and business enterprises of the inhabitants of the district from destruction by the flood waters of the Mississippi River. Its revenue, as appears from the history thereof hereinbefore set forth, has never been derived from an assessment of property according to benefits derived by it from the construction and maintenance of the levees, but from taxation of the character that the state employs for raising its revenue, and under Sections 236 and 237 of the State's Constitution, the legislature is not required, if indeed it has the power, to restrict the district to raising its revenue from an assessment of benefits. Smith v. Willis, 78 Miss. 243, 28 So. 378. Consequently, the cases cited in the brief of counsel for the appellant dealing with inequalities and differences in method of assessing benefits to property from a local improvement, e. g. K. C. S. Railroad Co. *v.* Road Imp. District, 256 U. S. 658, 65 L. Ed. 1151, are of little value here.

Before proceeding further with this discussion it may be well to point out that "the legislature may create taxing districts to meet the expenses of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse". Gast Realty Co. *v.* Schneider Granite Co., 240 U. S. 55, 60 L. Ed. 523; Houck *v.* Little River Drainage District, 239 U. S. 254, 60 L. Ed. 266; K. C. S. Railroad Co. *v.* Road Improvement District, supra.

2. The appellant's second proposition is: "The so-called railroad privilege tax demanded by the Mississippi Levee District is not really a privilege tax. It is an exaction of a fixed amount per mile of railroad without relation to the granting of any privilege and is arbitrary and unreasonable and therefore unconstitutional and void." As hereinbefore set forth, this privilege tax was imposed under paragraph (d), Section 5 of Chapter 154, Laws of 1932, Section 10 of which provides: "The property of the railroads and other public utilities and the privileges exercised by them within the Mississippi Levee District shall be taxable under the foregoing powers granted the Board in the same manner and to the same extent as the property and the privileges of other persons and corporations within said district, but this shall not be construed to require all classes of privileges to be taxed at the same time nor at the same proportion."

The order of the Board of Commissioners levying the tax is a literal rescript of Section 176, Chapter 20, Laws of 1935, which imposes a state privilege tax on railroads, except that the tax is restricted in the order to the levee district. It is true that neither the statute permitting the levying of this tax, nor the order of the levee board levying it confers on a person or corporation the privilege of operating railroads, but the state, in the absence of a constitutional restriction, has the power to tax persons and corporations engaged in an occupation or business and to prohibit them from continuing therein unless the tax is paid. Stewart *v.* Potts, 49 Miss. 749; Clarksdale Ins. Agency *v.* Cole, 87 Miss. 837, 40 So. 228; and authorities infra. The state may select the occupations and professions to be taxed, authorities supra and infra, and particularly New York Rapid Transit Corporation *v.* City of New York, 303 U. S. 573, 82 L. Ed. 1024, and authorities there cited, the only requirements in this connection being, (1) that all of the same class be taxed alike; authorities, supra; and State *v.* G. M. & N. Railroad Co., 138 Miss. 70, 104 So. 689; Bell's Gap Railroad Co. *v.* Pennsylvania, 134 U. S. 232, 33 L. Ed. 892; Giozza *v.* Tiernan, 148 U. S. 657, 37 L. Ed. 599; Magoun *v.* Ill. Trust & Savings Bank, 170 U. S. 283, 42 L. Ed. 1037; Southwestern Oil Co. *v.* Texas, 217 U. S. 114; 54 L. Ed. 688; and (2) that

the tax imposed be not so unnecessarily high as to deprive the persons taxed of the right to engage in a lawful occupation or business. Mathison *v.* Brister, 166 Miss. 67, 145 So. 358. The grading of the tax according to railroad mileage is unobjectionable. Postal Telegraph-Cable Co. *v.* Robertson, 116 Miss. 204, 76 So. 560; C. & G. Railroad Company *v.* Miller, 283 U. S. 96, 75 L. Ed. 861; C. & O. Railroad Co. *v.* Conley, 230 U. S. 513, 57 L. Ed. 1597; Stanley *v.* Public Utilities Commission, 295 U. S. 76, 79 L. Ed. 1311; New York Rapid Transit Corporation *v.* City of New York, supra. In C. & G. Railroad Co. *v.* Miller, supra, the Court approved the mileage tax imposed on railroads in the Mississippi Levee District by Chapter 282, Laws of 1914.

3. The appellant's third proposition is: "A tax on railroad property for a local improvement which is greater than that paid by the owners of other property in similar situation is a denial of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States."

This privilege tax applies equally to all of the same class of persons or corporations subject thereto and there is nothing in the evidence or judicially known to us to indicate that it imposes an unreasonable burden on the appellant. Taxation on a mileage basis does "not of itself prove that the choice was beyond the range of legislative authority." Stanley *v.* Public Utilities Commission, supra, citing C. & G. Railroad Co. *v.* Miller, supra; Continental Baking Co. *v.* Woodring, 286 U. S. 352, 76 L. Ed. 1155; Sproles *v.* Binford, 286 U. S. 374, 76 L. Ed. 1167. Nor does the fact that the only other railroad in the district has a small amount of mileage, and consequently pays a much smaller tax than does the appellant. A privilege tax imposed on several occupations may be valid as to an occupation in which only one person is engaged.

The appellant has no just cause of complaint because of the fact that it is called on to pay an ad valorem and an acreage tax on its land in common with other landowners, and in addition thereto a tax on the privilege of operating its railroad. The two taxes are separate and distinct. If

a person owns lands in the district, but is not engaged in an occupation or business therein, he pays only the taxes levied on land. If in addition to owning land he is also engaged within the district in an occupation or business tax he pays both a land and a privilege tax. If he owns no land in the district but is there engaged in an occupation or business, he pays only the privilege tax thereon. All persons "similarly situated" are therefore taxed alike. If the appellant's complaint is that the aggregate of the two taxes it pays is an undue portion of the total amount of taxes to be collected by the district, the same result will be reached. Assuming, though the evidence does not disclose, that the appellant pays more taxes than does any other property owner, that fact is brought about by the privilege tax paid by it and not by property owners who are not engaged in the railroad business. It does pay a privilege tax greater in amount than that imposed on any other public utility, but that fact alone as hereinbefore pointed out does not invalidate the tax, equality among different occupations not being required.

The appellant makes no contention that it derives no benefit from the levee maintained by this district, and could not successfully do so for the reason that it is common knowledge that portions of its railroad without the levees could not be operated at all during a part of each year because of overflow water from the Mississippi River. This fact, since the tax is not unreasonably discriminatory, relieves it of any charge of being palpably arbitrary and a plain abuse. Memphis & Charleston Railway Co. v. Pace, 282 U. S. 241, 75 L. Ed. 315.

Affirmed.

IN THE SUPREME COURT OF MISSISSIPPI

No. 33,914

Y. & M. V. R. COMPANY

vs.

THE BOARD OF MISSISSIPPI LEVEE COMMISSIONERS

EN BANC: ANDERSON, *J.*, Dissenting:

The levee district is fundamentally a special improvement district, not a governmental agency.

In my opinion, the tax laid against the railroad company is unreasonably discriminatory and therefore falls within the condemnation of the equal protection clause of the Federal Constitution. Realty and Investment Co. *v.* Schneider Granite Company, 240 U. S. 55, 60 L. Ed. 523, 36 Supt. Ct. 254; Kansas City Southern R. Co. *v.* Road Improvement District, 256 U. S. 658, 65 L. Ed. 1151, 41 Sup. Ct. 604; Thomas *v.* Kansas City R. Co., 261 U. S. 481, 67 L. Ed. 758, 43 Sup. Ct. 440; Road Improvement District *v.* Missouri R. Co., 274 U. S. 188, 71 L. Ed. 992, 47 Sup. Ct. 563.

The tax against the railroad company is also an arbitrary abuse of power and falls within the condemnation of the due process clause of the Federal Constitution. Houck *v.* Little River Drainage District, 239 U. S. 254, 60 L. Ed. 266, 36 Sup. Ct. 58; Valley Farms Co. *v.* Westchester County, 261 U. S. 155, 67 L. Ed. 585, 43 Sup. Ct. 261; Memphis & Charleston R. Co. *v.* Pace, 282 U. S. 241, 75 L. Ed. 315.

McGehee, and Griffith, JJ., also dissent.

(8547)